***Abstract****.* Scholars and commentators have expressed recurring concerns over sellers’ frequent use of excessively harsh or pro-seller terms in their contracts, safe in the assumption that consumers will not read the contracts. In recent decades, many have called on policymakers and courts to regulate the contents of these agreements. However, little is known about how these contractual provisions are actually enforced by sellers in their ongoing dealings with consumers. This scholarly deficiency could be attributed to the widespread assumption that sellers typically adhere to the arrangements set forth in their standardized agreements.

This Article challenges that prevailing wisdom. It reveals that sellers often intentionally adopt rigid and unconditional terms on paper with the intent of systematically deviating from these terms in favor of consumers. Based on a series of interviews, combined with an original, wide-scale field study, this Article offers the first comprehensive account of *selective enforcement of consumer contracts*—sellers’ strategy of adopting clear and rigid contract terms in their formal agreements alongside more liberal policies authorizing their employees to depart from these terms in their on-the-ground dealings with consumers.

This Article uses mixed empirical methods to study this phenomenon. First, a series of interviews with fifteen store clerks working in the Chicago retail market was conducted. The interviews revealed that both clerks and store managers are often instructed to selectively depart from clear and rigid contractual provisions, especially when dealing with dissatisfied customers. Second, building on this qualitative work, an original field study was designed to test whether, when, and why sellers depart from their contractual provisions in the context of product returns. For these purposes, six auditors were sent to return clothing items without receipts to ninety-five retail stores that formally require receipts for returns.

The results reveal that businesses’ actual implementation of ostensibly harsh, clear-cut provisions differs considerably from how these terms appear on paper. Across a wide variety of stores—both chain and local, high-end and casual—a substantial proportion of sellers accepted the returns notwithstanding the testers’ failure to present a receipt. This willingness was even more pronounced after consumers complained.

While these novel findings may seem puzzling at first glance (for why would sellers include terms that they did not intend to enforce against the consumer?), the interviewed store clerks’ accounts provide an important explanation for sellers’ observed behavior. When sellers expect to encounter a degree of consumer misbehavior or abuse, but are concerned that they will experience difficulties in verifying such advantage-taking to arbitrators or courts, they may find it profitable to include contractual terms that they can use at their discretion to penalize customers for undesirable behavior. The presence of a rigid term on paper allows sellers to use information that they can observe only *ex post* (after consumers have entered into the transaction) to weed out “bad apples” who would take advantage of a more lenient written contract, while reputational considerations will typically constrain sellers from following these terms to the letter when interacting with good-faith consumers.

Drawing on this theoretical account, this Article evaluates the implications of sellers’ selective enforcement strategies for consumers. To the extent that consumers are adequately informed about sellers’ actual practices, selective enforcement is likely to be welfare-enhancing, as it enables non-opportunistic buyers to enjoy better treatment than that dictated by their contracts, while allowing sellers to keep prices low by screening out consumers who would exploit a more generous written term. However, consumers might be uninformed about sellers’ actual practices and consequently assume that the written contract exhausts their rights and remedies. As a result, they may refrain from presenting even a meritorious claim to the seller, believing that the written terms of the contract will be strictly observed. These formalistic intuitions are exacerbated among poorer, less educated consumers and those belonging to minority groups (e.g., non-white and female consumers). Given this context, sellers’ exercise of discretion on the ground likely leads to discrimination, leading to the troubling conclusion that selective enforcement of contracts disproportionately benefits upper-class white males at the expense of other consumers.